No. 77-1019

In the Supreme Court of the United States

OCTOBER TERM, 1977

LIVESTOCK MARKETERS, INC. and PAULK AND BATTEN LIVESTOCK COMPANY, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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1. Petitioners are two corporate livestock dealers registered with the Secretary of Agriculture pursuant to the Packers and Stockyards Act of 1921, 42 Stat. 159, as amended, 7 U.S.C. 181 *et seq.* (Pet. Supp. App. 5). Both corporations operate in the same facility in Douglas, Georgia (*ibid.*). The officers of the two corporations are the same, and each officer owns 25 percent of the stock of each corporation (*id.* at 5-6).

An administrative law judge found that petitioner Livestock Marketers "knowingly weighed livestock at less than their true and correct weights and to facilitate such shortweighing did not issue scale tickets to the sellers of such livestock" (Pet. Supp. App. 18). The administrative law judge also determined that "[t]here is a very real

possibility of using one corporate entity to avoid a suspension period levied on the other" (*id.* at 6), and she therefore ordered both petitioners to cease and desist from their unfair and deceptive practices and suspended them for seven days (*id.* at 24-25).

The judicial officer of the Department of Agriculture also found that petitioners knowingly shortweighed livestock (Pet. Supp. App. 27-39). In order to maintain consistency of decisions, and to enhance the deterrent force of the law, he increased the sanction to 30 days' suspension (*id.* at 40-44).

The court of appeals affirmed (558 F. 2d 748; Pet. App. A-9 to A-13). The court held that the Secretary's finding of intentional shortweighing of livestock was supported by substantial evidence and the sanction is not " 'unwarranted in law or without justification in fact,' *Butz* v. *Glover Livestock Comm'n Co., Inc.*, 411 U.S. 182, 185-86 * * *" (Pet. App. A-12). It also concluded that because petitioners "functioned to a great extent as a single entity prior to the finding of the violation" and because a warning concerning weighing discrepancies "put both corporations on notice * * * prior to the violation," both petitioners properly could be suspended (*id.* at A-13).

2. Petitioners contend (Pet. 8-10) that Paulk and Batten Livestock Company may not be suspended because it did not commit the violations in question. But corporate forms may be disregarded when failure to do so would permit use of the corporate device to circumvent the purpose of a federal regulatory statute. See, *e.g.*, *Bangor Punta Operations, Inc.* v. *Bangor & Aroostook R.R.*, 417 U.S. 703, 713; *Sebastopol Meat Company* v. *Secretary of Agriculture*, 440 F. 2d 983 (C.A. 9); *Bruhn's Freezer Meats of Chicago, Inc.* v. *United States*

Department of Agriculture, 438 F. 2d 1332, 1342-1343 (C.A. 8); *Mansfield Journal Co.* v. *Federal Communications Commission*, 180 F. 2d 28, 37 (C.A.D.C.) (license applications by two companies owned and operated by one family properly treated as application by single entity).

The evidence in this case supports the Secretary's conclusion (Pet. Supp. App. 37) that it was necessary to pierce the corporate veil. The corporations are owned by the same four persons (in the same proportions), operate at the same location, and use the same facilities. The corporations do not deal with each other at arm's length but function as a single entity, taking a single profit on individual transactions (*id.* at 29-30). The person who short-weighed the hogs on behalf of Livestock Marketers is also the President of Paulk and Batten (*id.* at 6, 18). Unless Paulk and Batten were suspended, the four owners could go on operating as before, escaping any effective sanction for their misdeeds. As the judicial officer noted: "[a] contrary holding would destroy effective regulation under this remedial legislation. It would not take long for most, if not all, persons subject to the Act to form two or more corporations to evade disciplinary orders" (*id.* at 37).

3. Petitioners' further argument (Pet. 10-12)—that the finding that there was intentional shortweighing is not supported by substantial evidence—is wrong. The scale used by petitioner was back-balanced by five pounds, and an expert testified that the back-balancing must have been intentional (Tr. 453). Petitioners issued no scale tickets, "which would facilitate shortweighing" (Pet. Supp. App. 35). Furthermore, petitioners had been warned nine months before the present incident about both inaccurate weighing and the failure properly to complete scale tickets, and petitioners were told that if similar discrepancies were found in the future, suspension of registration

could result (*id.* at 31-32, 35). As the judicial officer concluded, "the inference is inescapable that [petitioners] * * * knowingly and intentionally weighed the hogs * * * at less than their true and correct weights" (*id.* at 36).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

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